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Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted] 43

MORRISON T. WADE and BESSIE LOU WADE, *Appellants*,

v.

THE PEOPLE OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the Recorder's Court for the City of Detroit (R. 223),[1] denying Appellants' Motion for New Trial, is not reported. Portions of said opinion, reference to which is necessary to ascertain the grounds of the judgment, are reprinted herewith as Appendix A (A-1). The Supreme Court of Michigan wrote no opinion in denying Appellants' Application for Leave to Appeal and Motion for Rehearing (R. 464, 465).

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[1] Citations to the unprinted Record are hereafter: "R. —"; to the printed Appendix: "A. —".

JURISDICTION

(i) This is an appeal from a sentence of conviction in the Recorder's Court of the City of Detroit, Michigan, under Sections 218, 280 and 505 of the Michigan Penal Code, M.S.A. §§ 28.415, 28.491 and 28.773, of conspiracy and commission of the substantive offenses of gross fraud and cheat, and of obtaining money by false pretenses.

(ii) The sentence of conviction in the Recorder's Court was imposed on October 23, 1951 (R. 56). That Court formally denied a timely motion for new trial on March 12, 1953 (R. 56, 223-297). The Supreme Court of Michigan denied Appellants' timely Application for Leave to Appeal on October 7, 1954 (R. 464), and their timely Petition for Reconsideration on October 20, 1954 (R. 465). Amended Notice of Appeal to the United States Supreme Court was filed with the Clerk of the Recorder's Court for the City of Detroit as "the court possessed of the record", Rule 11.1, Rules United States Supreme Court, on December 28, 1954 (R. 473). Upon Appellants' timely application, the time for docketing the cause was extended by Judge John A. Ricca, Judge of the Recorder's Court, to and including March 31, 1955.

(iii) The constitutional validity of the state statute in question having been sustained below, the jurisdiction of this Court to review the judgment below is conferred by 28 U.S.C. § 1257(2).

(iv) The jurisdiction of this Court is believed to be sustained by *Winters* v. *New York*, 333 U. S. 507 (1948). See also *Chicago G. W. R. Co.* v. *Basham*, 249 U. S. 164 (1919); *Tumey* v. *Ohio*, 273 U. S. 510 (1927).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Public Acts 1917, No. 196, as amended by Public Acts 1921, No. 395, Mich. Comp. Laws 1929, §§ 17217 and 17218, M.S.A. § 28.943 and § 28.944, commonly known as the Michigan judge-grand jury statute,

and the Fourteenth Amendment to the Constitution of the United States. They are set forth in Appendix B (A-36 et seq.).

The statute was amended, subsequent to the judge-grand jury proceeding here, in 1949 to substitute a grand jury made up of three judges, Public Acts 1949, No. 311, but a second amendment, Public Acts 1951, No. 276, reinstated the previous one-judge system, supplementing it with certain new provisions, M.S.A. § 28.943 and § 28.944. In Appendix A the new material is indicated by italics (A-36).

QUESTIONS PRESENTED

1. Does the Michigan judge-grand jury statute, either generally or as applied in this case, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

2. Does such a statute, authorizing criminal prosecution pursuant to the complaint of the judge-grand jury, violate the due process clause in that the criminal charge represents not merely an accusation but a judicial finding of probable guilt which destroys the presumption of innocence inherent in our system of criminal justice?

3. Does such a statute violate the due process clause when the complaining grand juror is a judge of the same circuit from which the petit jury is drawn?

4. Does such a statute violate the due process clause by destroying the independence and impartiality of both the judges who sit as inquisitors and those who preside at trials on charges filed by other judges?

5. Can such a statute be constitutionally applied unless the witnesses, the prosecution and the trial judge scrupulously avoid mention in the jury's presence of the fact that a local judge initiated the prosecution?

6. Were appellants denied the fair and impartial trial required by the Fourteenth Amendment because the charge

was initiated by a judge-grand jury of the same court as that in which the trial occurred, and that fact was repeatedly emphasized by the prosecution, the witnesses and the court to the petit jury!

STATEMENT OF THE CASE

In brief, this appeal challenges the constitutionality of the Michigan one-judge grand jury statute discussed heretofore by this Court in *In re Oliver*, 333 U.S. 257 (1948). Appellants' conviction of fraudulent solicitation of charitable contributions followed the longest criminal trial in Michigan history. The charges were first made by a formal Process issued by a single judge of the Michigan Recorder's Court, following a five-month inquiry by that judge acting alone as a grand jury. Appellants contend that accusation by a judge-grand juror fatally prejudiced their case before the petit jury, that their conviction was not justified by the actual evidence and was unconstitutional.

1. The One-Judge Grand Jury Investigation

The case arose out of the operations of the Society of Good Neighbors, a non-profit charitable organization of which appellants Morrison T. Wade and his wife, Bessie Lou Wade, were members of the Board of Trustees. "[T]his criminal proceeding was instituted" (R. 37) by one-judge grand jury called pursuant to a formal Petition in the Recorder's Court for the City of Detroit on February 2, 1948, filed by James N. McNally, Prosecuting Attorney for Wayne County, and Eugene F. Black, Attorney General for the State of Michigan. Invoking the statute here challenged, Section 17217, Comp. Laws, and requesting the appointment of a one-judge grand jury, this Petition stated, in general terms, that "certain persons . . . have combined and confederated . . . in a conspiracy or conspiracies to commit certain crimes" including "gross cheats," "larcenies" and "certain other crimes" not named (R. 466). It further stated (R. 467):

> "Petitioners are unable at the present time to state the name or names of the offender or offenders involved but the identity of such offender or offenders may be axcertained [sic] through the investigation hereinafter prayed for, and that there is probable cause to suspect that John Doe and/or Richard Roe and/or Mary Doe and/or Mary Roe are guilty of such crimes and offenses."

The prayer of the Petition was granted on the next day. Judge Gerald Groat, Presiding Judge of the Recorder's Court, appointed himself as grand juror "to inquire into the matters set forth in the petition" (R. 469). Despite the broad language of the Petition, the inquiry as it developed was solely concerned with the Society of Good Neighbors and the Wades.

Early in the grand jury proceedings the Court, under the guise of a subpoena, ordered all the books and records of the Society taken into custody. These amounted to thirteen four-drawer file cabinets, numerous cartons of papers, ledgers and check stubs (R. 228). This action brought the work of the charity to an abrupt halt; the material was never returned (R. 227-228, 329).[2] On the basis of the information gleaned from this material by his thirty-man staff, Judge Groat issued several hundred other subpoenas compelling the testimony of persons connected with the Society or the Wades. These were sworn and interrogated in secret concerning all the phases of the work of the organization, including the accounting practices, the methods of soliciting contributions of cash and waste, and the case-by-case distribution of funds and material to the poor.

The Wades were also subpoenaed. They were examined by the Court at great length and were denied the right to

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[2] Counsel for appellants was not permitted to study these records during the grand jury investigation—or indeed at any time after they were taken by the grand jury staff until the trial began. And even then he was permitted to work with the material only during the trial or in short recesses, and then in the court room (R. 228, 329, *et seq.*).

have counsel present. Their personal files were "broken into" twice in 1948, and when Wade requested a police investigation of the matter, the authorities refused it (R. 275-78). Some of this material was apparently used directly in the one-judge grand jury investigation (R. 276-277). Wade's business office was ransacked five times during 1948. (*Ibid.*)

This judge-grand jury investigation lasted five months. It culminated on June 19, 1948, in the issuance of a Process ordering the arrest of the appellants signed by Judge Groat of the Recorder's Court. (R. 299 *et seq.*) This Process was issued under the statute challenged here. § 17218. It contains the court's conclusion that an "offense [had] been committed and that there [was] probable cause to suspect [some] person to be guilty thereof." (*Ibid.*) Adopting the general language of the Petition for a Grand Jury, *supra*, the Process issued by Judge Groat in this case charged the commission of four offenses, including two conspiracies involving more than twenty named persons, but found cause to believe in a commission of these offenses only by the two Wades (R. 299 *et seq.*).

It was this Process "upon which defendants were arrested and the present proceeding initiated." (R. 36). They neither pleaded guilty nor not guilty to the charges, but "stood mute on their pleas" (*Ibid.*). They also moved to dismiss the Process on the ground, among others (R. 459):

> "That the One-Man Grand Jury Law . . . is unconstitutional because it threatens to and does deprive defendants of their liberty without due process of law . . . in violation of Section 1, of the 14th Amendment of the Constitution of the United States."

The Motion was denied on July 19, 1948 (R. 37) and thereafter, following the filing of an Information (R. 310 *et seq.* 317), they were arrainged on May 12, 1949, by another judge of the Recorder's Court (R. 37).[3] The Information

[3] Prior to arraignment the Court conducted a fifty-four day preliminary examination of some 120 witnesses (R. 23).

was for all practical purposes identical with the Process issued by the judge-grand juror, and like it charged the substantive offenses of gross cheat and frauds and conspiracies (R. 310).

2. The Trial

When the case came to trial in the Recorder's Court for the City of Detroit, one judge of that court had already passed on appellants' probable guilt. Furthermore, the judge-grand juror's investigation had been extensively reported in the press of Detroit (R. 9, 124-125, 155, 327, 328). In the process of appointing the jury from the panel of twenty presented for this trial, it was discovered that each one admitted having heard or read about the inquiry in the newspapers, and that nine of the twenty had already formed firm opinions of the guilt of the defendants as a result of the Court's charge (R. 155).[4]

The prosecution's theory of the case before the jury rested on the charge, as stated on appeal in the Michigan Supreme Court, that the Wades had committed fraud; "through the use of charitable appeals in the name of [the Society they] obtained goods, monies and articles of value . . . and misappropriated, misused and applied such money

[4] Defendants had moved for a change of venue on the ground of prejudice from this publicity of the judge-grand juror's charge, alleging that "so much adverse publicity has been given defendants . . . that the defendants cannot possibly have a fair trial within the City of Detroit" (R. 327; see also R. 328). This Motion was argued before Judge Gordon on the same day that he heard the Motion to Dismiss. On the next day Judge Gordon entered an order denying only the Motion to Dismiss and "left" for permanent residence in Florida. (R. 39). But when defendants sought to reargue the Motion for a Change of Venue on the ground that newspaper reports of the grand jury investigation made fair trial impossible the second judge refused to act on it because an informal letter from Judge Gordon, stating that he had meant to deny that Motion, was thought to amend the Docket (R. 39, 332). Thus no proper hearing on the prejudice motion was ever held.

and articles to their own use instead of to the relief of the poor . . . " (R. 53).

It relied largely on the circumstantial proof in the books of account of the Society (See R. 440-441). Its chief witness was an accountant named Jack Friedman (R. 70-82-D). The prosecution identified and introduced this voluminous documentary evidence through him. It also qualified him as an accounting expert to testify concerning his own interpretation and audit of this material. The documentary evidence was the same material which had been confiscated by the judge-grand jury; Friedman's audit had originally been prepared in cooperation with the grand juror's staff and submitted to him. Friedman's testimony contains constant reference to the grand jury. He explained that he had originally acquired the books of account several days after the grand jury was authorized, and under its authority (R. 70). From this material he had prepared the audit (R. 70 *et seq.*) The figures concerning annual personal withdrawals by the Wades (R. 71-79) had first been prepared at the time of the grand jury (see R. 82-82A). His testimony concerning gross income of the Society at trial was the same as that testimony at the inquiry (R. 82-C). Thus, in effect, Friedman emphasized that the massive accounting material which the prosecution relied on to support the charge of "misuse," as well as his conclusions, had already been submitted to and seen—and believed—by the judge of the Recorder's Court who made the original charge.

Other prosecution witnesses mentioned the grand jury proceedings and the evidence there adduced (R. 84, 91). Some of the testimony before the grand jury was read directly to the petit jury (R. 184). Parts of it were used by the prosecution to impeach defense witnesses (R. 165). However, when the defense attempted to examine the context of these impeaching statements in the grand jury transcripts for purposes of rehabilitation they were refused the opportunity to do so (R. 177). And they were

also denied access to grand jury evidence which might have been useful for impeachment of prosecution witnesses (R. 264).

The prosecution mentioned the judge-grand jury investigation several times in his closing, particularly to point up the inconsistent grand jury and trial testimony of some of the witnesses (R. 179, 184). And at the outset of his charge the Court emphasized the fact that the proceeding had been initiated by the judge-grand jury by stating:

> "The fact that these defendants have been arrested, brought into this court, and confronted with the trial, is a matter of procedure, and is not, in and of itself, evidence of guilt. In this connection, you have no right to be influenced by the fact the defendants have been brought into this court through the action of a one-man grand jury." (R. 382).

> "The defendants Morrison T. Wade and Bessie Lou Tanner Wade were charged with the offenses which have been read to you in the Information, said Information and the complaint on which it was based having arisen out of a one-man grand jury." (R. 383).

Thereafter he drew repeated reference to the grand jury proceedings in his outline of the defendant's theory of the case, and the accusation that the grand jury proceeding was politically-inspired and motivated by an intent to harass the Wades (R. 412-418). He closed his charge with this significant reminder:

> "I further charge you that in arriving at a verdict in this cause, you have the right to take into sonsideration [sic] the logical sequence of events leading up to the defendants' arrest on the charges made against them." (R. 444-445).

3. The Verdict

Defendants moved for a directed verdict both at the close of the prosecution's case on July 17, 1951 (R. 54, 339), and at the end of the trial (R. 54, 346). Both motions were denied (R. 54) and the case went to the jury on a general

charge of fraud on the 105th day (R. 223). Following the verdict of guilty defendants made their Motion for a New Trial on grounds, among others, that the one-judge grand jury statute violated the Fourteenth Amendment (R. 113). The Recorder's Court held this ground "untenable" (R. 223).

A new trial should also have been granted as a result of evidence of jury tampering. In addition to the references to the grand jury proceedings at trial, one of the jurors was shown to have lived next door to one of the members of the police department attached to the Recorder's Court (R. 201-05). She had denied this fact on voir dire (R. 154-55). Affidavits of the jurors obtained after the verdict decision demonstrated that her presence on the jury had had great effect on the verdict (R. 213-21).[5]

Following the trial court's ruling on March 12, 1953 (R. 56, 223 *et seq.*), appellants were sentenced and filed their timely application for Leave to Appeal to the Supreme Court of Michigan (R. 1 *et seq.*, 56). This raised again the constitutionality of the one-judge grand jury statute under which the proceedings against them had been instituted (R. 464F). It was denied by the Supreme Court on October 6, 1954 (R. 464). A timely Petition for Reconsideration was denied on October 20, 1954 (R. 465).[6]

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[5] Furthermore, as the court stated, several of the jurors were visited by Detroit police officers during the course of the trial; "one of them was asked if he had been threatened and the other was asked if, or was told they were under surveillance." (R. 23-33, 45-52, 203-5, 246).

[6] The Recorder's Court and the Michigan Supreme Court also denied requests to stay the proceedings and ordered Wade committed and his wife released on probation. Application was made to Mr. Justice Reed for an order granting bail to Wade, and staying the proceedings as to his wife, on the ground that an appeal was contemplated involving the substantial question of the constitutionality of the one-judge grand jury statute. This application was granted on November 1, 1954. The Amended Notice of Appeal was filed on December 28, 1954 (R. 473), and the Recorder's Court extended the time for docketing the appeal to and including March 31, 1955.

ARGUMENT

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal challenges the constitutionality of the Michigan one-judge grand jury system.[7] It is based on the contention the Fourteenth Amendment forbids a state to aggregate in one judge the combined powers of a policeman, grand jury and court, and that appellants' conviction following judicial indictment violated their rights to due process of law.[8]

A. The One-Judge Grand Jury System Is Not In Accord With Due Process of Law

1. INDICTMENT BY THE COURT DESTROYS THE PRESUMPTION OF INNOCENCE: The Michigan one-judge grand jury system replaces the traditional twenty-three man grand jury drawn from the private citizens of the jurisdiction with a single member of the judiciary. It lodges in one judge the unusual powers of criminal investigation and inquisition. He may be appointed to investigate a wide area of suspected criminal activity as a result of the petition under the statute. Once empowered, it is within his discretion to set the bounds of the inquiry and to hear what testimony he will. He is aided by a large staff which he selects and appoints. He has unfettered power to subpoena witnesses and documents. He may summarily punish for contempt either for refusal to appear or answer or for answering falsely. Proceedings are secret. They "can be carried on day or night, in a public place or a 'hide out,' a courthouse, an office building, a hotel room, a home, or a place of busi-

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[7] The statute has been amended since the proceedings here, but the amendments do not change its essential provisions. See A-36.

[8] It is fundamental that a defendant may challenge unconstitutional error in grand jury proceedings in spite of a subsequent petit jury conviction. See *Carter* v. *Texas*, 177 U.S. 442 (1900); *Pierre* v. *Louisiana*, 300 U.S. 354 (1939). And this is especially clear where, as here, the challenge is based on the claim that it was the very grand jury accusation which prejudiced the later trial.

ness." *In re Oliver*, 333 U.S. at 263. And following this inquiry, it is the court's individual responsibility to file Process, charging the commission of a criminal offense.

Such a charge is clothed with all the respectability of the judiciary. It stands on a different plane than an indictment by lay grand jury, or information by the prosecuting attorney. The court, in effect, declares that his plenary inquisition has demonstrated the probable guilt of the accused.

Proceedings such as those in this case destroy any possible presumption of innocence in favor of the defendants. The complaint here was no longer merely an accusation.[9] The court had conducted what was in fact, if not in name, a five-month trial of all the evidence later submitted to the jury and had announced his judgment on the proof. He said in effect that from the evidence he had seen that it was probable that the average jury would convict the Wades. Each of the jurors knew of the charge (R. 155). It would be unrealistic to deny the effect of such a finding on the minds of the petit jurors. Unlike the ordinary grand juror, the judge-accuser is not a mere layman, unskilled in the complexities of the law. Nor is he an adversary as is true where a prosecutor is the accuser.[10] He is and ought to be a symbol of impartiality; his judicial acts, including such findings of probable cause of the commission of a crime, are given great weight by the public and the bar. In a criminal proceeding like this, a judge's "lightest word or intimation is received with deference, and may prove controlling." *Starr* v. *United States*, 153 U.S. 614, 626 (1894). The petit jury could not, in the nature of things, apply a presumption against such a finding of probable guilt by the court, as it could to a non-judicial indictment or information. The accusation has already been approved by the judge.

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[9] See *In re Oliver*, 333 U.S. 257 (1948); *Tot* v. *United States*, 319 U.S. 463, 466 (1943).

[10] Compare *Hurtado* v. *California*, 110 U.S. 516 (1884).

A Michigan commentator has aptly described the plight of a defendant enmeshed in such a proceeding:[11]

> "The appointment of a circuit judge to act as an accuser has a very practical disadvantage to an innocent citizen. It has the effect of largely nullifying the benefit of the presumption of innocence, a term we use so commonly that we are likely to forget that it is one of the most valuable rights of the innocent. The circuit judge, particularly in a small community, uniformly occupies a very high place in the confidence of his constituents. As a prolific source of news he is cultivated by the press. His name is before the people day by day. The high regard in which he is held is very fortunate from the standpoint of sustaining the dignity of the court and encouraging respect for the judiciary. But not so fortunate are the consequences to the innocent citizen who is charged with crime by a circuit judge acting as an inquisitor. The very fact that the county's most respected citizen makes the charge is taken as evidence of the defendant's guilt, and the presumption of innocence becomes for him a meaningless phrase."

The system is therefore plainly at war with basic concepts of procedural fairness. No other jurisdiction in the nation prejudices criminal defendants in this fashion. There is no analogy to it in the whole history of Anglo-Saxon criminal procedure.[12] The common law since the

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[11] Gallagher, *The One Man Grand Jury—A Reply*, 29 J. Am. Jud. Soc. 20, 22 (1945).

[12] The common law system of non-judicial indictment was firmly established at the close of the middle ages. Thus the canon law practice of instituting criminal prosecutions without the necessity of an accuser, which ultimately found its way into French civil law and into the proceedings of continental Inquisition courts during the Renaissance, gained no foothold in England. See 5 Holdsworth's *History of English Law* 168-78 (1927). Even the procedure of the Star Chamber under the statute *Pro Camera Stellata*, 3 Hen. 7, c. 1 (1487) required "a bill or informacion put to the seid Chauncellor . . ." before actual criminal process of the court itself could begin. See 16 Selden Society, 1 *Select Cases in the Star Chamber*, x, xiv-xxvii (1902); also 25 Selden Society, 2 *Select Cases in the Star Chamber* (1910).

Magna Carta has known but three methods of instituting criminal process: indictment by the grand jury, information by the state and appeal by a private citizen. In England, it was long the rule that the traditional grand jury was required in treason and capital cases; in this country in the federal courts the Fifth Amendment demands a grand jury in proceedings involving "infamous" crimes while the states, since *Hurtado* v. *California*, 110 U.S. 516 (1884),[13] have experimented widely with such techniques as informations, private complaints and grand juries of reduced size.[14] But none of these variations, with the one Michigan exception challenged here, actually transfers bodily to the judiciary the functions of investigation and accusation. The judiciary never has and cannot have any part in the institution of criminal proceedings. The courts have no power to accuse. As stated by Erskine in his famous argument before the King's Bench in support of a new trial in the *Dean of St. Asaph* case:

> "If a man were to commit a capital offence in the face of all the Judges of England, their united authority could not put him upon his trial:—they could file no complaint against him, even upon the records of the supreme criminal Court, but could only commit him for safe custody . . ."[15]

And this is so because the jury system plainly cannot work when the courts issue the charge. Basic fairness in jury cases require that they be immune from influences which will impair their objective weighing of the evidence. See *Moore* v. *Dempsey*, 261 U.S. 86 (1923). Judicial ac-

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[13] For criticism of the *Hurtado* holding that the Fourteenth Amendment permits the states to adopt procedures inconsistent with the Fifth, see Rutledge, concurring, *In re Oliver*, 333 U.S. 278, et seq. (1948); 2 Crosskey, *Politics and the Constitution* 1134-1141 (1953).

[14] The various state systems are reviewed in Orfield, *Criminal Procedure from Arrest to Appeal* 135-265 (1947).

[15] 1 Ridgway, *The Speeches of Thomas Erskine* 275-76 (1813).

cusation is such an influence, just as are biased comments on the evidence by the court, *Quercia* v. *United States*, 289 U.S. 466 (1933), or expressions of opinion as to the guilt or innocence of the accused, *Starr* v. *United States*, 153 U.S. 614 (1894). These plainly destroy the right to a fair and impartial trial. It is basic that "the authority of the bench be not exploited toward a conviction [the court] may privately think deserved or even required by the evidence."[16] But where, as here, the accusation comes from the court itself the defense is fatally prejudiced. Such unfairness is inconsistent with the Fourteenth Amendment.

2. THE ONE-JUDGE GRAND JURY SYSTEM INVADES THE INDEPENDENCE OF THE JUDICIARY: The corrosive effects of this system are not limited to its impact on the function of the petit jury; as well, it raises a serious constitutional question in terms of the impartiality of the courts. Under this system, the judiciary has the duty to investigate, and accuse of, crime and the correlative responsibility of sitting on cases involving such official accusations.

The "commingling"of investigative and adjudication functions has recently been invalidated in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950). There, petitioner was an alien whose deportation hearing had been conducted by an immigrant inspector of the Immigration Service. Although he had not been responsible for the investigation of the alien status of Wong,

> "the inspector's duties include investigation of like cases; and while he is today hearing cases investigated by a colleague, tomorow his investigation of a case may be heard before the inspector whose case he passes on today." 339 U.S. at 45.

This fusion of separate duties, the Court said, was prohibited by the Administrative Procedure Act, 60 Stat. 237,

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[16] *United States* v. *Brandt*, 196 F. 2d 653, 656 (2d Cir. 1952).

240, 5 U.S.C. § 1001 *et seq.*, 1004(c). It rejected the Government's contention that since the Act in terms applied only to hearings required by statute, hearing and investigation by the same person in the immigration field was permissible. The absence of an impartial hearing in the scheme

> "might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." 339 U.S. at 50.

Similarly, a judge exercising the power to make official charges of criminal activity cannot meet "currently prevailing standards of impartiality."

The warning of Mr. Justice Cardozo in another context is forceful here, *Matter of Richardson*, 247 N.Y. 401, 407, 411-12, 160 N.E. 655, 656, 657 (1928):

> "A preliminary investigation, thus restricted, is not a hearing by a judge. It is a search by an inquisitor.
>
> • • • • • • • • •
>
> "The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the district attorney of the county, he would do no more and no less. What he learns is not committed to a record available to all the world. It is locked within his breast to be withheld or disclosed as his discretion shall determine. No doubt he is to act impartially, neither presenting from malice nor concealing from favor. One might say the same of any prosecutor. The outstanding fact remains that his conclusion is to be announced upon a case developed by himself. Centuries of common law tradition warn us with echoing impressiveness that this is not a judge's work." [17]

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[17] The underlying principle, that the judiciary be not called upon to perform non-judicial tasks, is as old at least as *Hayburn's Case*, 2 Dall. 409 (1792). See also *United States* v. *Ferreira*, 13

Here, too, the judge's "conclusion is to be announced upon a case developed by himself." That conclusion is in form limited to "probable cause" of the defendants' guilt. But the process is no less damaging for this fact. The investigating judge casts his lot with the validity of his accusation. His reputation may, and often does, depend on it. He has announced a conclusion of guilt before trial, something plainly inconsistent with his responsiblity as a court.

Judicial endorsement of a case leaves its mark upon the trial judge who presides over it as well. He cannot be insensitive to his colleague's interest in the outcome of the proceeding. A favorable ruling for the defendant may oppose or cast doubt upon his brother's determination of the same question. The next time he may be the judge-grand juror and his colleague the trial judge.

In short, by thrusting upon judges the investigative and accusatory function that "is not a judge's work," *Matter of Richardson, supra*, the one-judge grand jury system makes prosecutors of the court. It destroys the strict judicial impartiality which the Federal Constitution commands. *Wong Yang Sung* v. *McGrath, supra.* A grand jury assignment is a notorious highway to political success in Michigan. Innumerable judges have exploited it solely for public acclaim and prominence. Sensational charges—such as the one in this case—which are later successfully prosecuted are an accepted technique for judicial advancement. The temptations of the system are inconsistent with fair trial; the politics of a prosecutor's office have no place on the bench. In the words of Chief Justice Taft in *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927):

How. 40 (1852). The language of the *Ferreira* opinion is applicable here (13 How. at 51): "The duties to be performed are entirely alien to the legitimate functions of a judge or court of justice, and have no analogy to the general or specific powers ordinarily and legally conferred on judges or courts to secure the due administration of the laws."

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold balance nice, clear, and true between the state and the accused denies the latter due process of law."

This, we contend, is such a procedure.

B. As Applied, the One-Judge Grand Jury System Deprived the Appellants of Due Process of Law

Appellants' convictions demonstrate its evils. They were condemned long prior to the petit jury trial by the Recorder's Court itself. The judge-grand juror's Process recited as a fact that they had unlawfully conspired "together and among themselves" and twenty other persons "to obtain and acquire unto themselves of and from citizens of the City of Detroit, . . . money, goods, chattels and other things of value, . . . with intend [sic] to cheat and defraud . . ." In this process the one-judge grand jury also found *cause* to believe that appellants Morrison T. Wade and Bessie Lou Wade *were guilty of the crimes charged.*

Thus, when the case was brought to trial appellants were already under the cloud of a judicial finding of probable guilt. The jury which heard the case was sitting in the Recorder's Court of the City of Detroit, of which the grand juror was one of the judges.

This fact was not lost on them. The prosecution was not content merely to remind the jury that a judge had returned the indictment. In effect, it also brought out that the evidence adduced at trial was the same evidence on which the court had based its finding of probable cause and that in fact certain of this evidence could be vouched for as having been prepared by the judge's own staff. Thus, in identifying certain cartons of exhibits, the people's witnesses were asked to state that the material had been originally confiscated for use before the judge-grand jury;

Friedman, the prosecution's accounting expert, mentioned the grand jury proceedings many times and stated that some of the exhibits prepared by him and introduced at trial had also been submitted to the grand jury in its proceedings (R. 70 *et seq.*, 177).

This technique for emphasizing the high source of the original charge and the evidence has an effect on the jury which is irremediable. It was reinforced by the trial judge himself when he charged (R. 382, 383):

> "The fact that the defendants have been arrested, brought into this court, and confronted with the trial is a matter of procedure, and is not, in and of itself, evidence of guilt. *In this connection, you have no right to be influenced by the fact that the defendants have been brought into this court through the action of a one-man grand jury.*" (Emphasis added.)
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> "The defendants Morrison T. Wade and Bessie Lou Tanner Wade were charged with the offenses which have been read to you in the Information, *said Information and the complaint on which it is based having arisen out of a one-man grand jury.*" (Emphasis added.)

If the one-judge grand jury statute is not otherwise invalid under the Constitution, elementary concepts of due process dictate that it cannot be constitutionally applied unless the prosecutor and the witnesses carefully abstain from mentioning to the jury the fact of the judge's sponsorship of the proceedings. This is especially so in a close case like this. Despite the enviable reputation of the Society of Good Neighbors as a charitable enterprise, the Recorder's Court, at the instigation of the prosecuting attorney, conducted a five-month investigation of what it labled a conspiracy to conduct a fraudulent charity involving some forty persons. Only two of these were ever charged. They were brought to trial in a prejudicial atmosphere. Their guilt had already been found as a matter of probability by the very court in which the trial took

place. The prosecution emphasized that the charge had come from a judge, and that the evidence had been seen and believed by him. Police visited jurors. One of the jurors failed to disclose on voir dire her acquaintanceship with a member of the police force attached to the court. And the trial judge himself emphasized the court's formal accusation in his charge.

In such an atmosphere, whether "misuse" of funds was actually proven by the accounting practices relied on by the prosecution is doubtful. The intent evidence was, to say the least, ambiguous. The trial was the longest ever held in a Michigan court; the accounting proof was incredibly complicated. In such a case the prosecution and the court had an unusually heavy responsibility to isolate the jury from extra-legal influences—of which the high source of the charge was certainly one. The injection of this fact into these proceedings was grossly prejudicial and unfair.

C. The Federal Questions Are Therefore Important

We think therefore that this appeal presents a serious and important issue under the Due Process Clause of the Fourteenth Amendment. The time is ripe for a decision. Michigan passed its one-judge grand jury statute in 1917. *In re Oliver*, 333 U.S. 257 (1948), was the first proceeding involving it in this Court. Petitioner had been convicted of contempt by a judge sitting as a grand jury and, on certiorari, the judgment was reversed on grounds that the conviction, having occurred *in camera* and without opportunity to defend or have counsel, violated due process. Though the opinion specifically ignores any challenge to the general "power of Michigan to grant inquisitorial grand jury power to a single judge . . . ", 333 U.S. at 264, Mr. Justice Rutledge, concurring, stated his view that "this

aggregated authority" was clearly unconstitutional, 333 U.S. at 278 *et seq.*[18]

The Court has already granted certiorari this term in *In re White*, No. 405, also from Michigan and involving, like *Oliver*, the validity of a contempt conviction for perjury during the one-judge grand jury investigation. Included among the questions presented is one challenging the constitutionality of the statute generally. We think that the grant of certiorari there is a demonstration of the importance of the issue presented here, and we urge that a full exploration of the one-judge grand jury calls for a simultaneous adjudication of both this case and *White*. The Court should now decide for all time the question which it left open in *In re Oliver, supra*.

Respectfully submitted,

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[18] The issue was presented in *Omacht* v. *Michigan*, appeal allowed September 20, 1950, but, before it could be heard in this Court, the Michigan Supreme Court reopened the proceeding and granted the appeal. The opinions below in *Omacht*, including *People* v. *Hancock*, 326 Mich. 471, 40 N.W. 2d 689 (1950) and *People* v. *Omacht*, 326 Mich. 505, 40 N.W. 2d 704 (1950) are the most recent discussion in the Michigan Supreme Court of the constitutional issues here presented.